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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL R. GREEN, Defendant and Appellant.	B168254 (Los Angeles County Super. Ct. No. BA235363)

Appeal from a judgment of the Superior Court of Los Angeles County. Dale S. Fischer and Ruffo Espinosa, Jr., Judges. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Marc J. Nolan and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

Michael R. Green appeals from the judgment entered upon his conviction by jury of first degree murder in which a principal intentionally and personally used and discharged a firearm, causing death (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b), (c), (d), (e)(1)).[1] It was found that the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). The trial court found that appellant had sustained a prior felony conviction within the meaning of the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). Appellant was sentenced to prison for 75 years to life.

Appellant contends that (1) his relinquishment of his right to self-representation was coerced because the trial court conditioned his right to represent himself on his agreement to proceed to trial the next day; (2) the imposition of a firearm enhancement under section 12022.53 violated principles of merger as well as section 654; and (3) his waiver of jury trial on the prior conviction allegations was flawed because California law limits his right to jury trial on such allegations in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466. We affirm.

FACTS

We view the evidence in accordance with the usual standard of appellate review. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) At approximately 7:00 p.m. on June 12, 2002, two men, one armed with a handgun, entered the courtyard of the apartment complex on South Broadway in Los Angeles in which appellant, an admitted member of the 69 East Coast Crips gang, lived and sold drugs. The men asked someone in the courtyard to get appellant. As appellant walked down the stairs, the man with the gun asked, "'Is that him?'" Appellant said, "'It's that fool,'" pointing at Michael Millage, who was in the courtyard selling drugs. The man with the gun fired three or four shots at Millage. Millage died as a result of three gunshot wounds.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Earlier that day, appellant had been informed by one of his roommates that a member of the Bloods gang was in the apartment complex. Appellant made a telephone call and then told his girlfriend, Joyce Harris,[2] to go to the East Coast Crips hangout and tell his fellow gang members that a member of the Bloods was at his apartment complex. At the hangout, Harris saw several members of the Crips gang get into two vehicles. Two of the men had guns they had obtained from appellant's brother's car. As Harris returned to the South Broadway apartment, she saw four or five of the gang members getting out of a car, and she witnessed the shooting of Millage. Appellant later told her that he had "masterminded a murder."

A Los Angeles police detective testifying as a gang expert stated that he believed the murder was committed for the benefit of the Crips gang. The victim was believed by appellant to be a member of a rival Blood gang and was selling drugs in an area considered Crips territory in which appellant sold drugs.

In defense, a friend of appellant's testified that appellant was with her at her residence across the street from where Millage was killed when they heard the shots that killed Millage.

DISCUSSION

I. Appellant's request for reappointment of counsel after he was granted self-representation was not coerced.

On the date of arraignment, February 24, 2003,[3] appellant brought a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118) to replace the appointed counsel who had represented him since before the preliminary hearing held earlier that month. The request for substitution of counsel was denied. The matter was continued to March 27 for pretrial matters, at which time appellant was present, and then to April 22, the 57th day, for trial. On April 22, appellant's counsel informed the trial court that appellant

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2 Harris was a prostitute and worked as a paid police informant.

3 All dates hereafter mentioned occurred in 2003 unless otherwise specified.

wanted to represent himself. The trial court asked appellant, "Would you be ready to go tomorrow, when I would send it to the trial court?" Appellant replied, "To get rid of him, yes." The trial court reiterated, "You would be ready to start?" Appellant stated, "To get rid of him, yes, for sure."

The trial court asked appellant to fill out the form requesting self-representation. Appellant stated, "I would like to go pro[.] per[.] with counsel." The trial court advised him, "You either go pro[.] per[.] or you have counsel. Which one is it?" Appellant replied, "I'll go pro[.] per[.]." After a recess, appellant was asked whether, having filled out the form, he still wanted to represent himself. He said yes. He stated that he understood everything in the form, including the fact that he was charged with murder and that, with a maximum term of 75 years to life, it was unlikely that he would ever be released from custody.

Although appellant stated he understood that he would not have a lawyer if he represented himself, he acknowledged that he had not checked or initialed that statement in the form because "I felt I'm going to need a representative." When the trial court told him that he had an attorney, he said, "No, no, not him. . . . I already been in front of you with a motion to get rid of him. . . . You denied it. . . . So I'm going to the next step to get rid of him." The trial court informed appellant that he was not entitled to advisory counsel but that it would appoint standby counsel in the event his right to self-representation was revoked. The trial court then again asked if appellant wanted to represent himself. He stated, "I guess so."

A discussion of the charges followed. Appellant claimed he was not aware of any of the enhancement allegations, and stated, "That's the whole reason to be going pro[.] per[.], so I can find out what I'm here for and what I'm up against, because my lawyer ain't told me nothing." The trial court asked if appellant wanted another *Marsden* motion. Appellant said yes. Another *Marsden* motion was conducted, and

appellant's request for substitution was denied.[4] The trial court stated, "As I said, I can't stop you from representing yourself if that's what you want to do." Appellant stated, "Thank you. I would like to continue with that." The trial court then granted appellant the right to represent himself and the matter was transferred to another courtroom for trial the next day.

When appellant appeared for trial before a different judge the following day, the trial court observed that he was wearing jail garb and asked if he had made arrangements for civilian attire. Appellant stated, "No. I am not ready at all, Your Honor. I just went pro[.] per[.] yesterday, and they haven't even put me in the pro[.] per[.] area module yet. . . ."[5] The trial court indicated it would have to appoint a different attorney to be standby counsel because the first attorney it had appointed was not ready to proceed, stating, "I don't want to delay this trial."

The prosecutor asked if he could "supplement the record," and asked appellant if he understood that he could have his former counsel reappointed at no cost to him. The prosecutor stated, "Now, you also have an absolute right due to our court[s'] rulings that you can represent yourself." Appellant stated, "I'm aware of that." The prosecutor asked, "Okay. Now it's one or the other. In other words, do you want an attorney?" Appellant replied, "Yeah. Because I'm not ready." The trial court asked, "Well, do you want me to reappoint [former defense counsel]?" Appellant said, "I'll

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[4] Appellant complained that counsel was not communicating with him, that he was unaware of the allegations, that counsel had almost given appellant's mother a heart attack by "telling her all the bad things," and that counsel had failed to bring motions that appellant believed should have been brought. Counsel explained that the motions had been brought and that appellant had become "progressively more hostile in the last month or two" to the point where he was unwilling to talk to counsel. The trial court found no reason to substitute counsel.

[5] Although the trial court stated, "You already made your pitch for a continuance, and that was denied by [the prior judge]," the record reflects that no request for a continuance had been made.

have to." After further discussion, the prosecutor stated, "Mr. Green, you have a choice." Appellant replied, "Yes. I would rather have an attorney."

After a recess during which appellant conferred with appointed counsel, the trial court asked, "And how about tomorrow morning at 10:30?" Counsel explained to the trial court that he had not announced ready before he was relieved the day before and would not have announced ready if appellant had not been granted self-representation, and that the case was still within the 60 days. Counsel stated, "Mr. Green has had a change of heart. He realizes now what he is up against, and he is working for [*sic*] me now." Counsel stated that he would need an additional two weeks to prepare for this murder trial. The trial court initially indicated it would grant a continuance of a couple of days, then, after conferring with both counsel, agreed to continue the matter to May 5 as 7 of 10 days. Appellant waived time. On May 5, counsel requested additional time for preparation because his investigation had disclosed a new witness he had not yet been able to contact. The prosecutor stated he had no objection to a further continuance. After ruling on several pretrial issues, the trial court ordered jury selection to commence on May 7.

Appellant contends that both trial courts' denials of a reasonable continuance to prepare for trial after he was granted self-representation denied him his state and federal rights to due process and counsel, and that his agreement to give up his self-representation status was therefore coerced. This claim is without merit.

A defendant has a federal constitutional right to waive counsel and represent himself. (*Faretta v. California* (1975) 422 U.S. 806, 819 (*Faretta*).) A motion for self-representation must be granted if it is timely, knowing, voluntary, and unequivocal. (*People v. Marshall* (1997) 15 Cal.4th 1, 20-21.) A motion made on the date set for trial is untimely. (*People v. Rudd* (1998) 63 Cal.App.4th 620, 626.) If the motion is untimely, the trial court has the discretion to deny the request after considering the factors set forth in *People v. Windham* (1977) 19 Cal.3d 121, 128. One of those factors is the disruption or delay that might reasonably be expected to

ensue if the self-representation request is granted, and a trial court may deny a request for self-representation made on the eve of trial if the defendant requests a continuance. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 592.) If self-representation is granted, the trial court must give the defendant a continuance to prepare for trial if he so requests. (*People v. Wilkins* (1990) 225 Cal.App.3d 299, 304.)

Appellant's request to represent himself was made on the day set for trial, after he had twice before appeared in the superior court with counsel. Since the motion was untimely, the trial court conditioned the granting of the motion on appellant's agreement to proceed to trial the next day. (*People v. Clark* (1992) 3 Cal.4th 41, 110 (*Clark*).) Appellant agreed to this condition. He did not state that he would need a continuance and did not express any reservations about his ability to be ready for trial.

In *Clark*, *supra*, 3 Cal.4th at page 110, the Supreme Court rejected the defendant's claim that the trial court had improperly conditioned its grant of his *Faretta* motion on the waiver of a continuance. The Supreme Court distinguished several cases including *People v. Maddox* (1967) 67 Cal.2d 647, on which appellant relies, stating, "Although a necessary continuance must be granted if a motion for self-representation is granted, it is also established that a midtrial *Faretta* motion may be denied on the ground that delay or a continuance would be required. [Citations.] . . . [T]his trial court made clear its intent to deny the *Faretta* motion as untimely if a continuance would be necessary. It had in fact denied other *Faretta* motions on this basis. The *Faretta* motion was ultimately granted only when defendant expressly represented he was able to proceed without a continuance."[6] Similarly, here, the grant

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[6] Appellant also relies upon *People v. Wilkins*, *supra*, 225 Cal.App.3d 299, a case decided before *Clark*, where the court held that the failure to grant a defendant a continuance after he was permitted to represent himself constituted a denial of his rights to counsel and due process. *Wilkins* relied primarily on *People v. Maddox*, and appellant's reliance on *Wilkins* is unavailing as well.

of self-representation was conditioned by the trial court and accepted by appellant on the premise that appellant would proceed to trial the next day.

It is apparent from the record that appellant's desire to represent himself resulted from frustration when he was not permitted to substitute new counsel for an attorney he perceived was not communicating with him. The record clearly reflects that he preferred to be represented by counsel and that his request for self-representation, followed by his agreement to proceed without a continuance because, at that time, he wanted to be "rid" of his appointed counsel, was equivocal. His request should not have been granted in the first instance. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1205-1206.) When, the next day, the prosecutor again placed before him the options of continuing to represent himself or having the trial court reappoint his former counsel, appellant clearly and voluntarily requested the reappointment of counsel.[7] His attorney thereafter explained to the trial court, after a discussion with appellant, that appellant was now prepared to work with counsel. We cannot conclude, on this record, that appellant was in any way coerced into relinquishing his self-representation status. Since appellant waived his right to self-representation and acquiesced in the reappointment of counsel, there was no Sixth Amendment violation. (*People v. Rudd*, *supra*, at pp. 630-631.)

II. The imposition of an enhancement pursuant to section 12022.53, subdivision (d) does not violate either principles of merger or section 654.

Appellant was sentenced to an enhancement of 25 years to life as a principal in the commission of an offense as to which findings were made under section 12022.53,

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[7] His assertion that he was not ready, after agreeing to self-representation on the express promise that he would proceed to trial the next day, may properly be characterized as a variant of "the "'*Faretta* game.'"" (*People v. Rudd, supra*, 63 Cal.App.4th at p. 633.)

subdivisions (d) and (e)(1) and section 186.22, subdivision (b).[8] He contends that imposition of the enhancement violates section 654 and the merger doctrine, because the predicate facts and requisite elements establishing his guilt of murder accomplished by use of a firearm under an aiding and abetting theory necessarily included the shooter's conduct in intentionally discharging the firearm and causing Millage's death.

In *People v. Sanders* (2003) 111 Cal.App.4th 1371, Division Five of this court rejected a similar claim. *Sanders* held that the merger doctrine is inapplicable in this situation and that section 654 does not preclude imposition of the section 12022.53, subdivision (d) firearm use enhancement. (*People v. Sanders*, *supra*, at pp. 1374-1376.) We agree with the analysis in *Sanders* and see no reason either to repeat it here or to depart from it.

III. Appellant's waiver of his right to jury trial on his prior conviction allegation was not invalid.

The information alleged within the meaning of the three strikes law that appellant had a 1991 conviction for assault with a firearm in violation of section 245, subdivision (a)(2). Appellant initially stated that he wished to have a jury trial on the prior conviction allegation. After the jury returned its verdicts, the trial court advised appellant of his right to have the jury or the trial court decide whether the alleged conviction was true, advising him that in either case the trial court would determine whether the prior conviction was a strike and that the court would determine the issue of identity. Appellant waived his right to jury trial. Following a court trial, the allegation was found true, and appellant was sentenced as a second-strike defendant.

Appellant contends that his waiver of jury trial, based on his discussion with counsel, was not knowing and intelligent, because the statutes governing proof of a

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[8] As appellant acknowledges, the People were not required to prove that the person who intentionally and personally discharged the firearm was convicted of the underlying offense. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1174.)

prior conviction allegation are constitutionally flawed. He asserts that the procedure runs afoul of the requirement of trial by jury set forth by the United States Supreme Court in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 (*Apprendi*) because section 1025 restricts the role of a jury in determining factual elements necessary to establishing the truth of such allegations beyond a reasonable doubt, and because under recent case authority the issues of the individual's identity and of whether the prior conviction constitutes a serious or violent felony are both left to the trial court. Appellant's contention is without merit.

Section 1025, subdivision (c), as amended in 1997, provides that "'the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.'" In *People v. Kelii* (1999) 21 Cal.4th 452, 456-457 (*Kelii*), the California Supreme Court held that the trial court, not the jury, is to determine whether a prior conviction constituted a serious felony.

In *Apprendi*, in an opinion issued after the amendment of section 1025 and after *Kelii* was issued, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) Although *Apprendi* thus expressly excepted prior convictions from its holding, appellant claims that the *Apprendi* opinion contains language indicating that its holding may also be applied to prior convictions.

The Supreme Court in *McMillan v. Pennsylvania* (1986) 477 U.S. 79 (*McMillan*) considered a law that required the imposition of a five-year minimum prison term, which did not exceed the statutory maximum for any of the covered crimes, after a finding by the trial court that the defendant possessed a firearm. (*Id*. at pp. 81-82.) The Supreme Court held that this involved a sentencing factor that did not have to be proved to a jury beyond a reasonable doubt. (*Id*. at pp. 85-86, 89-90.) In *Apprendi*, the Supreme Court stated, "We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the

statutory maximum for the offense established by the jury's verdict -- a limitation identified in the *McMillan* opinion itself." (*Apprendi*, *supra*, 530 U.S. at p. 487, fn. 13.) The court reserved the issue of whether stare decisis precluded its reconsideration of *McMillan*. (*Ibid*.)

In *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*), the Supreme Court held that a sentence enhancement allegation based on prior felony convictions need not be set forth in an indictment because it constituted a sentencing factor, not a criminal offense. (*Id*. at p. 235.) In *Apprendi*, the court stated, "Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, . . . we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence." (*Apprendi*, *supra*, 530 U.S. at pp. 489-490, fn. omitted.) In addition to citing these statements in *Apprendi*, appellant further points out that Justice Thomas stated in his concurring opinion in *Apprendi* that he had erred in *Almendarez-Torres* in finding no right to jury trial on prior convictions. (*Apprendi*, *supra*, at pp. 520-521.)

However, Division Three of this court has stated that *Apprendi* did not overrule either *McMillan* or *Almendarez-Torres*. (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 153, 155.) Division Five of this court has held that *Apprendi* did not overrule *Almendarez-Torres*. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) We agree with these determinations.

Furthermore, in *People v. Epps* (2001) 25 Cal.4th 19 (*Epps*), our Supreme Court observed that the right to jury trial on prior conviction allegations is statutory, not constitutional, and concluded that section 1025, as amended, still provides a limited right to jury trial on prior conviction allegations. (*Epps*, *supra*, at pp. 25-27.) The court did not undermine its holding in *Kelii*, however, and reiterated that the trial

court, not the jury, is to determine whether a prior conviction is a serious felony for purposes of the three strikes law. (*Epps*, *supra*, at pp. 23-24.) In response to the claim that, after *Apprendi*, a defendant has the right to trial by jury on the issue of whether a prior conviction is a serious felony, the court stated, "We do not now decide how *Apprendi* would apply were we faced with a situation like that at issue in *Kelii*, where some fact needed to be proved regarding the circumstances of the prior conviction -- such as whether a prior burglary was residential -- in order to establish that the conviction is a serious felony." (*Epps*, *supra*, at p. 28.) The court pointed out that "*Apprendi* . . . reaffirms that defendants have no right to a jury trial of 'the fact of a prior conviction' [citation]," and that in the case before it, "only the bare fact of the prior conviction was at issue, because the prior conviction (kidnapping) was a serious felony by definition under section 1192.7, subdivision (c)(20)." (*Epps*, *supra*, at p. 28; see *People v. Collins* (2001) 26 Cal.4th 297, 313, fn. 5; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)[9]

At the time of appellant's instant offense, appellant's prior conviction for assault with a deadly weapon was, by definition, a serious felony for purposes of the three strikes law. (§§ 1192.7, subd. (c)(31); 1170.125; see *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 617-618.) Thus, here, as in *Epps*, there was nothing other than "the bare fact of the prior conviction" which had to be proved to establish that appellant's prior conviction was a serious felony. (*Epps*, *supra*, 25 Cal.4th at pp. 23, 28; *In re Taylor* (2001) 88 Cal.App.4th 1100, 1109.) Furthermore, *Apprendi* does not

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9 The Supreme Court has granted review on the issue of whether, under *Apprendi*, a defendant is entitled to a jury trial on the question whether his prior out-of-state conviction constitutes a serious felony for purposes of sentencing under the three strikes law when the elements of the foreign offense differ from the elements of the offense under California law, and the sentencing issue thus depends upon whether the record of the prior conviction establishes that the defendant's prior conduct amounted to the same offense under California law. (*People v. McGee* (2004) 115 Cal.App.4th 819, review granted April 28, 2004, S123474.)

give a defendant the right to trial by jury on the issue of identity. (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165.) The right to jury trial on a prior conviction allegation is statutory, and, pursuant to *Epps*, whose authority is binding on us (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), proof of the fact of a prior conviction in this case is not within the holding of *Apprendi*. We therefore reject appellant's contention.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P.J.

BOREN

We concur:

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_____, J.

ASHMANN-GERST